THE NAFTA CROSS-BORDER TRUCKING PILOT PROGRAM: HONORING NAFTA THROUGH A MODIFIED U.S. DEMONSTRATION PROJECT

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Abstract: Since 1982, the U.S. Department of Transportation has prohibited Mexican truck drivers from obtaining operating authority to drive their trucks beyond a twenty-five mile commercial zone within the United States. In September 2007, the Bush Administration and the Department of Transportation launched a one year NAFTA Pilot Program that would allow one hundred pre-screened Mexican carriers to operate freely within the entire United States. Subsequently, the Pilot Program has created controversy between U.S. labor, afraid of job loss, and U.S. corporations, who desire cheaper movement of goods. Moreover, Congress has repeatedly, yet futilely, tried to forestall the Program. This paper proposes that, contrary to prevailing opinion, NAFTA’s language obligates the U.S. to implement a program to grant U.S. operating authority to Mexican carriers, but that the current Pilot Program is ineffective at implementing inspection procedures, preempts other federal laws, and violates Mexican sovereignty. This paper, through tracing the history of the Program from NAFTA arbitration to modern implementation, proposes substantive changes that the U.S. should adopt to resolve the Pilot Program’s current issues, including stricter NAFTA arbitration requirements, methods to improve inspection to comply with federal and international law, and implementing an efficacious tracking system of Mexican carriers to ensure U.S. safety.
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I. INTRODUCTION

Luis Gonzalez left Monterrey, Mexico and arrived at the U.S. border crossing in Laredo, Texas at 10:30 P.M.\(^1\) Through the night, U.S. authorities questioned Gonzalez and inspected his vehicle for over two hours before permitting him to enter the United States.\(^2\) Gonzalez, however, was not a trafficker, smuggler, or immigrant, but rather the first Mexican truck driver in decades to obtain U.S. operating authority to deliver goods within the United States beyond the delineated twenty-five mile commercial zone.\(^3\) Upon entering the U.S., Gonzalez hauled a load of steel across the country, arriving safely in North Carolina days later.\(^4\)

While Gonzalez may be the first Mexican truck driver in decades to drive beyond the commercial zone, Mexico anticipates that many Mexican truck drivers will acquire U.S. operating authority under the recent U.S.-sponsored North American Free Trade Agreement (“NAFTA”) Pilot Program. As partisan tension mounts in the United States regarding the Pilot Program, its future remains uncertain. While it is debatable whether NAFTA obligates the United States to permit Mexican trucks to operate within the U.S., the United States should implement a modified Pilot Program that resolves the current Pilot Program’s issues regarding ineffective inspection procedure implementation, federal law preemption, and violation of Mexican sovereignty.

In February 2007, President Bush approved the Pilot Program. The Program lifted the over two-decade U.S. moratorium that banned Mexican trucks from obtaining free operating

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2 *Id.*
authority within the United States. President Bush lifted the moratorium in response to international pressure after a NAFTA arbitral panel decision that insisted that NAFTA obliged the United States to allow Mexican trucks to operate freely within the United States after December 18, 1995. Accordingly, the Bush Administration authorized the Department of Transportation ("DOT") to implement a year-long Pilot Program that would allow one-hundred pre-screened Mexican trucking companies to obtain operating authority within the entire United States.

The Pilot Program generates ardent and divergent opinions. Organized labor, the Pilot Program’s most outspoken critic, cites the Program’s damaging effects on American safety. Teamsters President Jimmy P. Hoffa characterized the Pilot Program as “dangerous” and “illegal.” Conversely, U.S. business and free trade supporters largely laud the Program, since it will likely facilitate commerce through the cheaper movement of goods. Likewise, DOT Secretary Mary E. Peters esteemed the Pilot Program as, “bringing U.S. drivers more opportunity, U.S. consumers more buying power[,] and the U.S. economy even more momentum.”

Part II of this Note outlines the history behind the U.S. moratorium on Mexican trucking, ending with the DOT’s 2007 NAFTA Pilot Program. Part III analyzes NAFTA’s language and Arbitral Panel decision to conclude that, despite vague Arbitral Panel recommendations, the U.S.

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6 See infra note 43.
7 Sec’y of Transp., supra note 5.
11 Sec’y of Transp. Mary E. Peters, supra note 7.
should honor NAFTA. Part IV, in examining the Pilot Program’s inspection procedures, demonstrates the Program’s technical problems, including violating Mexican sovereignty and disregarding U.S. national safety. Part V concludes by proposing changes the U.S. and Mexico should pursue to resolve issues arising under the NAFTA Pilot Program.

II. BACKGROUND: THE HISTORY BEHIND THE PILOT PROGRAM

In the 1980s, North American policy makers perceived that European attempts to unify intra-European trade would effectively reduce European dependence on North American trade.12 Foreseeing the loss in reliable European trading partners, the U.S., Mexico, and Canada began NAFTA negotiations in 1990 to foster North American regional economic integration.13

U.S. President Bush, Mexican President Salinas, and Canadian Prime Minister Mulroney signed NAFTA on December 17, 1992. President Bush hailed the Agreement as “opening up new horizons of opportunities and enterprise,”14 while President Salinas declared that NAFTA “‘herald[ed] a commitment to fair and competitive development.’”15 Subsequently, U.S. Congress passed the NAFTA Implementation Act in November 1993. The Implementation Act served two functions, “to ‘approve’ NAFTA and to provide a series of laws to ‘locally’ enforce NAFTA’s provisions.”16

Since the NAFTA Implementation Act, the U.S., Mexican, and Canadian economies have grown by more than forty percent.17 Today, NAFTA’s Parties trade over $2.4 billion in goods

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13 Id. at 4-5.
and services each day. But while commercial trucks carry nearly seventy-five percent of commerce between the Parties, the current system of transferring products from one country’s truck to another costs consumers approximately $400 million each year.

To foster trade, NAFTA Article 102(1) delineates the Agreement’s objectives, including eliminating trade barriers, facilitating cross-border movement of goods and services, and creating efficacious procedures for implementing the Agreement within the respective countries. NAFTA Chapter 12 incorporates Articles regarding cross-border trade in services, including Article 1202 (National Treatment), Article 1203 (Most-Favored Nation Treatment), and Article 1204 (Standard of Treatment).

NAFTA Annex I permitted the U.S. to preserve a moratorium banning Mexican trucks from obtaining Interstate Commerce Commission operating authority within the United States until the Annex I scheduled moratorium phase-out. The Annex I phase-out obligated the United States to grant Mexican trucks U.S. operating authority within the U.S.-Mexican border states by December 18, 1995, and within the entire United States by January 1, 2000.

Nonetheless, U.S. tensions regarding Mexican trucking began prior to NAFTA’s enactment when Congress passed the Bus Regulatory Reform Act of 1982. Congress enacted this Act that effectively prevented Mexican and Canadian motor carriers from operating in the United States for two years because of Mexican refusal to allow U.S. trucking within Mexico.

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18 Id.
19 Id.
21 NAFTA, supra note 20, at ch. 12.
22 NAFTA, supra note 20, at annex I.
23 NAFTA, supra note 20, at annex I.
Prior to this Act, Mexican and Canadian trucking maintained free operating authority within the United States.\textsuperscript{26} Accordingly, the Bus Regulatory Reform Act introduced a two-year moratorium on U.S. – issued transportation permits to motor carriers domiciled in, or owned or controlled by persons in Mexico or Canada.\textsuperscript{27}

But in September 1982, President Reagan lifted the Canadian moratorium, as Canada agreed to permit U.S. trucking companies to operate within Canada.\textsuperscript{28} President Reagan refused, however, to lift the moratorium with respect to Mexico, citing Mexican refusal to grant U.S. trucking Mexican operating authority.\textsuperscript{29}

Between 1984 and 1995, U.S. Presidents continued the moratorium on Mexican trucking within the United States, hoping that Mexico would concede to allow U.S. trucks within Mexico.\textsuperscript{30} Nevertheless, since 1982 the United States has allowed Mexican trucking to operate within a twenty-five mile commercial zone inside the United States.\textsuperscript{31} Mexico, however, continued to withhold all Mexican operating authority from U.S. trucks until the recent Pilot Program.\textsuperscript{32}

Despite the 1993 NAFTA Implementation Act, President Clinton issued a Presidential Order in December 1995 that effectively suspended the NAFTA Annex I phase-out, thus perpetuating the U.S. moratorium against Mexican trucks.\textsuperscript{33} Facing political friction from organized labor, President Clinton refused to lift the moratorium on grounds that the U.S. had not

\textsuperscript{27} Weisweaver, \textit{supra} note 25 at 473 n.20; 49 U.S.C. § 10922(m) (1994).
\textsuperscript{28} Memorandum on the Bus Regulatory Reform Act of 1982, 18 \textsc{Weekly Comp. Pres. Doc.} 1180 (Sept. 20, 1982).
\textsuperscript{29} Id.
\textsuperscript{33} Blackmore, \textit{supra} note 31, at 702.
implemented adequate safety standards or enforcement programs to ensure U.S. public safety.\textsuperscript{34} Subsequently, Congress passed the Interstate Commerce Commission Termination Act that safeguarded the President’s authority to maintain, modify, or retract the cross-border trucking moratorium.\textsuperscript{35}

Foreseeing interpretive conflicts, NAFTA’s drafters incorporated in Chapter 20 a dispute resolution system regarding interpreting and applying the Agreement. The dispute resolution system contains three steps.\textsuperscript{36} First, when a Party has a dispute with another country, that Party must initially request consultations with the other country.\textsuperscript{37} If consultations do not resolve the dispute, the Party may next request a meeting with the NAFTA Free Trade Commission.\textsuperscript{38} Lastly, when the Free Trade Commission fails to resolve the dispute, the Party may request the formation of a NAFTA arbitral panel.\textsuperscript{39}

On December 18, 1995, the day of the U.S.’ scheduled phase-out of the Mexican moratorium, Mexico began the three-part NAFTA dispute resolution process by requesting consultations with the United States, as the U.S. insisted it would continue the moratorium.\textsuperscript{40} After consultations with the U.S. Trade Representative proved futile, Mexico pursued a meeting with the NAFTA Free Trade Commission.\textsuperscript{41} Following the Free Trade Commission’s inability to

\textsuperscript{34} Putnam, \textit{supra} note 30, at 1292.
\textsuperscript{35} Interstate Commerce Commission Termination Act, 49 U.S.C. § 13902(c)(3) (2000). “The President, or the delegate thereof, may remove or modify in whole or in part any action taken under paragraph (1)(A) if the President or such delegate determines that such removal or modification is consistent with the obligations of the United States under a trade agreement or with United States transportation policy.”
\textsuperscript{36} NAFTA, \textit{supra} note 20, at arts. 2006-08.
\textsuperscript{37} NAFTA, \textit{supra} note 20, at art. 2006.
\textsuperscript{38} NAFTA, \textit{supra} note 20, at art. 2007.
\textsuperscript{39} NAFTA, \textit{supra} note 20, at art. 2008.
\textsuperscript{40} Blackmore, \textit{supra} note 31, at 705.
\textsuperscript{41} Blackmore, \textit{supra} note 31, at 705 n.48.
resolve the Parties’ dispute, Mexico in September 1998 petitioned to assemble a NAFTA arbitral panel.\textsuperscript{42}

In February 2001, the Arbitral Panel found the U.S. had breached NAFTA by refusing to grant Mexican trucks operating authority within the United States. Accordingly, President Bush insisted he would lift the moratorium by January 1, 2002.\textsuperscript{43} In response to the President, the Senate passed a transportation appropriations bill that effectively continued the moratorium until the DOT met twenty-two specific safety measures.\textsuperscript{44} President Bush signed legislation to codify these safety-measures in 2001.\textsuperscript{45}

Additionally, labor and environmentalists filed suit on May 1, 2002 in the Ninth Circuit Court of Appeals seeking review of the DOT’s preceding actions to open the border to Mexican trucking firms.\textsuperscript{46} In January 2003, the Ninth Circuit held that the DOT’s actions to lift the moratorium violated the Clean Air Act and National Environmental Policy Act because the DOT neglected to compose an Environmental Impact Statement.\textsuperscript{47} Nevertheless, the Supreme Court reversed and remanded the Ninth Circuit decision, finding that the Clean Air Act did not require an Environmental Impact Statement.\textsuperscript{48}

On February 23, 2007, Secretary of Transportation Mary Peters announced the U.S.-Mexico NAFTA Pilot Program that would allow one-hundred Mexican trucking companies to

\begin{footnotes}
\item[42] Weisweaver, supra note 25, at 474.
\item[44] Elizabeth Townsend, NAFTA, Mexican Trucks, and the Border: Making Sense of Years of International Arbitration, Domestic Debates, and the Recent U.S. Supreme Court Decision, 31 TRANSP. L. J. 131, 168 n.299.
\item[46] Pub. Citizen v. Dep’t of Transp., 316 F.3d 1002, 1009 (9th Cir. 2003).
\item[47] Id. at 1032.
\end{footnotes}
deliver goods within the entire United States.\textsuperscript{49} The Pilot Program further obligated Mexico to reciprocally allow one-hundred U.S. trucking companies to enter and compete within Mexico.\textsuperscript{50}

In August 2007, the Teamsters, Sierra Club, and Public Citizen sought, in the Ninth Circuit, to stay the NAFTA Pilot Program.\textsuperscript{51} Subsequently, the Ninth Circuit denied the emergency motion to stay, thereby permitting the Pilot Program to begin as scheduled.\textsuperscript{52}

On September 6, 2007, the DOT’s issued a report regarding the safety of the NAFTA Pilot Program.\textsuperscript{53} In the report, the Inspector General corroborated that the Federal Motor Carrier Safety Administration (“FMCSA”), a DOT subdivision, had taken the required steps to ensure the Pilot Program’s safe implementation.\textsuperscript{54} The report clarified that the DOT had successfully met Congress’s twenty-two imposed safety measures.\textsuperscript{55} On the same day the DOT issued the report, the first Mexican-domiciled trucking company under the Pilot Program, Transportes Olympic, crossed into the United States.\textsuperscript{56}

Although the DOT assured Congress that the FMCSA implemented the safety measures regarding the Pilot Program, the Program’s future remains ill-defined. In July 2007, the House of Representatives voted 362 – 63 to prohibit funding for the Pilot Program under the Duncan-Kaptur amendment to the FY2008 Transportation Appropriations Act.\textsuperscript{57} Further, the U.S. Senate on September 11, 2007, voted 75 – 23 on S. 1789 to exclude DOT funding for the Pilot Program

\textsuperscript{49} Sec’y of Transp., \textit{supra} note 5.  
\textsuperscript{50} Sec’y of Transp., \textit{supra} note 5.  
\textsuperscript{52} Id.  
\textsuperscript{53} Id.  
\textsuperscript{55} Sec’y of Transp., \textit{supra} note 53, at 1.  
\textsuperscript{56} Sec’y of Transp., \textit{supra} note 53, at 1.  
\textsuperscript{57} Adams, \textit{supra} note 1.  
under the FY2008 Transportation Appropriations Act. In a Statement of Administration Policy, the President vowed to veto any appropriations act which prohibits funding for the NAFTA Pilot Program. In January 2008, the DOT under Bush Administration approval, cited a loophole in the Pilot Program law that prohibits the government from spending money to “establish” the program. The DOT claimed that the government would not use funds to “establish” the Pilot Program as the Program already commenced in September 2007. Accordingly, the DOT has continued to grant U.S. operating authority to Mexican carriers under the Pilot Program. Nevertheless, Congress, with its power of the purse, will likely continue to withhold funding for the Program through appropriations’ bills and new legislation. Moreover, the next President must deal with the shortcomings of the Program and the U.S.’ concomitant NAFTA obligations.

III. THE U.S. SHOULD HONOR NAFTA DESPITE VAGUE NAFTA ARBITRAL PANEL RECOMMENDATIONS AND ARBITRATION SHORTCOMINGS

The U.S. must make good faith efforts to honor the Arbitral Panel’s recommendations that the U.S. comply with NAFTA because respecting the Agreement will strengthen the U.S.’ relationship with Mexico. Moreover, the U.S. must disregard NAFTA’s arbitration deficiencies to respect NAFTA Annex I, as complying with the Agreement will encourage Mexico and Canada to respect NAFTA arbitration regarding potential conflicts with the U.S. in the future.

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61 Id.
62 Id.
A. U.S. – Mexican Arbitration: In Re Cross-Border Trucking Services

In Mexico’s moratorium-related arbitration with the United States, the NAFTA Arbitral Panel functioned as the final interpreter of NAFTA’s meaning.\textsuperscript{63} The Arbitral Panel structured the issue as to whether the United States breached NAFTA Article 1202 (National Treatment) or Article 1203 (Most-Favored Nation Treatment) by failing to retract the U.S. moratorium that banned processing applications for Mexican trucking firms to operate within the United States.\textsuperscript{64} The Panel initially stated that the U.S. could only justify the moratorium through the language in NAFTA Articles 1202, 1203, 2101 (General Exceptions), or Chapter Nine (Standards).\textsuperscript{65}

In generating a decision, the Panel looked primarily at NAFTA’s language. NAFTA Article 1202, defining “National Treatment,” states that: “Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.”\textsuperscript{66} Further, Article 1202, section 2, defines “treatment” as that “no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to service providers of the Party of which it forms a part.”\textsuperscript{67} Furthermore, NAFTA Article 1203, which characterizes “Most-Favored Nation Treatment,” provides: “Each Party shall accord to service providers of another Party treatment no less favorable that that it accords, in like circumstances, to service providers of any other Party or of a non-Party.”\textsuperscript{68}

\textsuperscript{63} Arbitral Panel Decision, \textit{supra} note 43.
\textsuperscript{64} Arbitral Panel Decision, \textit{supra} note 43.
\textsuperscript{65} Arbitral Panel Decision, \textit{supra} note 43.
\textsuperscript{66} NAFTA, \textit{supra} note 20, at art. 1202.
\textsuperscript{67} NAFTA, \textit{supra} note 20, at art. 1202.
\textsuperscript{68} NAFTA, \textit{supra} note 20, at art. 1203.
The Panel reached its decision by analyzing the Parties’ arguments and interpreting “in like circumstances” regarding National Treatment and Most-Favored Nation Treatment. As NAFTA provided no definition or guidance regarding “in like circumstances,” the Panel sought insight from other international trade agreements, including the General Agreement on Tariffs and Trade (“GATT”), and the Canada-U.S. Free Trade Agreement (“FTA”). To justify the moratorium under National Treatment, the U.S. argued it could show Mexico less favorable treatment because U.S. and Mexican trucking regulatory systems were discernibly different so as to not satisfy the “in like circumstances” proviso. The U.S. further contended under Most-Favored Nation Treatment it could afford Canada more favorable treatment than Mexico, because Canada’s regulatory system satisfied the “in like circumstances” clause, while Mexico’s did not. The Panel concluded that the U.S.’ interpretation of “in like circumstances” was too expansive, and thus frustrated NAFTA’s objectives.

To resolve the NAFTA trucking dilemma, the Panel recommended that the U.S. take several steps to bring itself within NAFTA compliance. The Panel’s decision does not require the U.S. to favorably consider “all or any specific number of applications from Mexican-owned trucking firms, when it is evident that a particular applicant or applicants may be unable to comply with U.S. trucking regulations when operating in the United States.” Additionally, the Panel indicated that the U.S. could treat Mexican operating authority applications differently than those from Canada, so long as the U.S. reviews the applications on a case-by-case basis.

69 Arbitral Panel Decision, supra note 43.
70 Arbitral Panel Decision, supra note 43.
71 Arbitral Panel Decision, supra note 43.
72 Arbitral Panel Decision, supra note 43.
73 Arbitral Panel Decision, supra note 43.
74 Arbitral Panel Decision, supra note 43.
75 Arbitral Panel Decision, supra note 43.
76 Arbitral Panel Decision, supra note 43.
The Panel ultimately concluded that the U.S. could impose different regulatory requirements on Mexican truckers than Canadian truckers, providing the U.S. makes that decision in, “a) [ . . . ] good faith with respect to a legitimate safety concern and b) implementing differing requirements that fully conform with all relevant NAFTA provisions.”\textsuperscript{77}

After the Panel’s decision, Congress approved legislation detailing twenty-two safety mandates necessary for granting potential U.S. operating authority to Mexican truck drivers.\textsuperscript{78} Congress conceivably reasoned that requiring the DOT to draft new safety standards correlated to “taking ‘appropriate steps’ in good faith with respect to a legitimate safety concern to bring [U.S.] practices into compliance with the [P]anel’s decision.”\textsuperscript{79}

B. Disregarding The Arbitral Panel’s Equivocal Recommendations

Although the Arbitral Panel’s recommendations are ambiguous, the United States should employ good faith efforts to bring itself within NAFTA compliance regarding the Annex I cross-border trucking provisions. In international agreements, good faith generally obliges an actor “to refrain from acts calculated to frustrate the objects of the treaty.”\textsuperscript{80} Good faith also reflects the classical notion of \textit{pacta sunt servanda} – that agreements must be respected.\textsuperscript{81}

First, as many international agreements provide no standard for good faith, including NAFTA, GATT, and the FTA, the U.S. should implement the Panel’s recommendations to ultimately satisfy NAFTA’s objectives. The Panel, however, complicated the good faith issue by refusing to delegate whose good faith judgment controls - that of the U.S. or Mexico.

Accordingly, the U.S. should make objectively reasonable efforts reflecting its own good faith to

bring the U.S. within NAFTA compliance. If Mexico deems that U.S. efforts to comply with NAFTA reflects a lesser standard than good faith, the U.S. should heed Mexican concerns and alter its approach to satisfy the Annex I trucking provisions and Panel recommendations.

Second, the U.S. should draw from WTO decisions to determine with respect to NAFTA what is a legitimate safety concern. The Arbitral Panel failed to properly define the term. Notwithstanding NAFTA, the United States legislates many legitimate safety concerns, ranging from environmental policy to highway protection. Nevertheless, multilateral international trade agreements characteristically refuse to define a “legitimate safety concern,” as each nation-state possesses different safety concerns. Although neither NAFTA, the Panel, nor international law provides a test for determining a legitimate safety concern, giving subjective deference to the United States to define a legitimate safety concern would frustrate NAFTA’s function. Accordingly, the U.S. should utilize WTO and prior arbitral panel decisions to determine what a legitimate safety concern is regarding Mexican trucking within the United States.

Third, while the Panel failed to describe what “relevant” NAFTA provisions the U.S. had to respect regarding imposing differing safety requirements on Mexican drivers, the U.S. should interpret this recommendation to include NAFTA’s National Treatment and Most-Favored Nation Treatment articles. In arbitrating the dispute, the Arbitral Panel focused primarily on these two articles, National Treatment and Most-Favored Nation Treatment, to develop its recommendations. The Panel’s recommendations do not intend to provide the U.S. with interpretive power to disregard these two articles merely because the Panel failed to identify what “relevant” articles the U.S. had to respect. Therefore, the U.S. should esteem NAFTA’s National Treatment, Most-Favored Nation Treatment, and Objectives as the relevant provisions

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82 See Townsend, supra note 44 at 142-45.
to imposing safety requirements on Mexican drivers, as these articles formed the basis for the Panel’s recommendations.

While the Arbitral Panel curtailed its decision by employing a minimalist resolution, the U.S. should objectively interpret the Panel’s recommendations to bring the U.S. within NAFTA compliance. First, the Panel refused to determine whether NAFTA Parties may “set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives.” The Panel, moreover, agreed that trucking safety regulation was a “legitimate regulatory objective.” In doing so, the Panel assigned partial interpretive power to the United States to establish its own legitimate regulatory objectives. Lastly, the Panel stated that it placed no limit on applying safety standards to regulate Mexican trucking within the United States. Nevertheless, the U.S. should disregard its broad interpretive powers to comply with NAFTA, as the U.S. originally entered into the agreement to strengthen its economic and political ties to Mexico and Canada. Therefore, the U.S. should impose legitimate regulatory standards on Mexican trucks, but not standards that make Mexican compliance unachievable.

C. Discounting General NAFTA Chapter 20 Arbitration Deficiencies

There are numerous shortcomings with NAFTA’s Chapter 20 dispute resolution system that the U.S. must momentarily disregard to demonstrate its good faith efforts to comply with NAFTA Annex I. The U.S. may later enter into negotiations with Mexico and Canada to resolve these arbitration issues, only after the U.S. attempts to satisfy the Arbitral Panel’s recommendations.

83 Arbitral Panel Decision, *supra* note 43.
84 Arbitral Panel Decision, *supra* note 43.
85 Arbitral Panel Decision, *supra* note 43.
First, NAFTA arbitral panel decisions do not bind the Parties, and thus oftentimes have little material effect on the Parties ultimate dispute resolution. Regarding panel decisions, NAFTA states that the Parties “shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel . . . .”\textsuperscript{86} NAFTA obligates the Parties to agree to the Panel’s recommendations or other mutual agreement within thirty days after the panel issues its report.\textsuperscript{87} NAFTA, however, permits the complaining Party to collect sanctions and suspend trading benefits with the defending Party when the Parties cannot agree to a resolution within the proscribed thirty day period.\textsuperscript{88} However, NAFTA employs no mechanism to enforce sanctions or to prohibit any Party from indiscriminately suspending trading benefits. Thus, NAFTA arbitral panel decisions do not strictly bind a Party, as NAFTA’s arbitration system requires mutual agreement after a panel decision and lacks an operative arbitration enforcement mechanism.

Nevertheless, panel decisions are not completely fruitless as the Parties may pursue countervailing measures to deal with any Party’s failure to comply with panel recommendations. Moreover, the Parties ultimately desire to honor NAFTA to maintain international reputations as reliable and non-contentious trading partners. Therefore, there remains an incentive for Parties to comply with panel recommendations despite NAFTA’s consent that the Parties may not agree to the recommendations.

Second, neither the United States nor Mexico may appeal the Panel resolution because NAFTA failed to provide an appellate procedure regarding Panel decisions. The Parties’ only appellate procedure is to reframe the original issue and proceed through the three-step process

\textsuperscript{86} NAFTA, \textit{supra} note 20, at art. 2018.
\textsuperscript{87} NAFTA, \textit{supra} note 20, at art. 2019.
\textsuperscript{88} NAFTA, \textit{supra} note 20, at art. 2019.
that culminates in another arbitration panel hearing. The lack of an appellate procedure foreseeable hinders Parties from pursuing NAFTA arbitration, and thus encourages Parties to handle disputes outside a NAFTA arbitration setting. This result threatens NAFTA’s intent to encourage agreement between the Parties, rather than litigation or repeated arbitration.

Lastly, proceeding through NAFTA’s three-part dispute resolution system generates an undue burden on a Party’s resources. A Party must expend vast amounts of time and money that ultimately result in imprecise panel “recommendations” and seemingly elusive sanctions.

While NAFTA’s arbitration mechanism contains various deficiencies, the U.S. should disregard these shortcomings to honor the Arbitral Panel recommendations. If the U.S. merely ignores panel recommendations, Mexico and Canada would foreseeably do the same, thus leaving the U.S. with no recourse when a NAFTA dispute arises with either country.

Additionally, ignoring NAFTA’s arbitration process threatens NAFTA’s main objective, to facilitate, rather than to hinder, free trade between NAFTA Parties. Lastly, the U.S. must make good faith efforts to follow panel recommendations because the U.S. entered into NAFTA because it was in the U.S.’ best interest to strengthen ties with Canada and Mexico.

IV. THE PILOT PROGRAM INSPECTION PROTOCOL VIOLATES MEXICAN SOVEREIGNTY AND DISREGARDS U.S. NATIONAL SAFETY

A. The NAFTA Pilot Program Safety Protocol

In 2002, the DOT informed Congress that it had satisfied all twenty-two congressional safety measures regarding the Pilot Program. On September 6, 2007, DOT Secretary Peters

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89 DOT, supra note 45. “In 2002, U.S. Transportation Secretary Norman Y. Mineta certified that DOT had met each of the 22 requirements set by Congress. The last three audits by the U.S. DOT Inspector General confirm it as well.”
wrote the Senate concerning the actions that the FMCSA undertook to ensure the Pilot Program would operate safely within the United States.90

In her report, Peters attempted to assuage the DOT’s Office of Inspector General’s earlier concerns which found that the DOT had not suitably implemented and developed an appropriate Pilot Program inspection procedure.91 Peters first stated that the FMCSA had begun to implement site-specific plans for checking every truck participating in the Pilot Program as the participants cross the border.92 Accordingly, Peters asserted the FMCSA had already requested assistance from U.S. Customs and Border Protection and State law enforcement officials to facilitate inspection.93

Peters additionally noted that the FMCSA had issued new enforcement guidance to State enforcement officials, and that the FMCSA “[would] ask its State partners to enforce provisions of the regulations not previously encountered . . . .”94 The Secretary included twenty-five policy implementation plans that described who would conduct inspection procedures at various border crossing points.95 Lastly, Peters included the DOT’s CVSA Inspection Decal Compliance Check Record aimed at standardizing inspection at each cross-border checkpoint.96

While the Secretary’s report confirms that the DOT has begun implementing Pilot Program safety procedures, her report concedes that Federal and State agencies have not fully employed the DOT plan, despite Mexican trucks already entering the U.S. under the Pilot Program. Peters stated that the FMCSA would ask State partners to enforce certain safety

90 Sec’y of Transp., supra note 53.
91 Sec’y of Transp., supra note 53 at 2-3.
92 Sec’y of Transp., supra note 53 at 2-3.
93 Sec’y of Transp., supra note 53 at 2-3.
94 Sec’y of Transp., supra note 53 at 3.
95 Sec’y of Transp., supra note 53 at encl. 3.
96 Sec’y of Transp., supra note 53 at encl. 2.
previously not encountered. Accordingly, the Secretary included a Demonstration Project State Outreach Plan in her report that delineated scheduled training for State law enforcement. This Outreach Plan, however, merely “expect[s]” State partners to enforce the DOT safety provisions, but does not demand implementation. Therefore, the DOT prematurely began the Pilot Program without States fully complying and understanding the Pilot Program inspection protocol. Nevertheless, the government may not compel state officials to enforce a federal regulatory scheme.

B. NAFTA Pilot Program Protocol Violates Mexican Sovereignty

The DOT’s Pilot Program inspection protocol violates Mexican political and territorial sovereignty. To inspect Mexican trucks, the DOT mandates U.S. inspectors to conduct fifty-percent of safety audits and compliance reviews on-site in Mexico. Mexico has acquiesced to this imprecise U.S. request, and the U.S. has not allowed Mexico reciprocal permission to conduct Mexican audits within the U.S.

The NAFTA Pilot Program essentially confronts Mexico with a Hobson’s choice: accept U.S. audits and compliance review within Mexico or confront a continuing moratorium. While Mexico consented to NAFTA, Mexico did not voluntarily consent to unforeseeable U.S. inspection procedures within Mexico regarding cross-border trucking. To facilitate the Pilot Program, Mexico has allowed the U.S. to conduct initial safety audits in Mexico.

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97 Sec’y of Transp., supra note 53 at 3.
98 Sec’y of Transp., supra note 53 at encl. 5.
99 Sec’y of Transp., supra note 53 at encl. 5.
100 See New York v. United States, 505 U.S. 144, 176-77 (1992) (holding that the Constitution “does not give Congress the authority to require States to regulate”).
103 Id.
The problem here is not simply one of consent, but rather lack of clarity regarding what U.S. audits within Mexico entail. Mexico’s consent is not “knowing” as the U.S. has failed to provide Mexico with complete details regarding U.S. audits in Mexico. The U.S. has only provided Mexico with the details of what procedure an inspector follows, but has failed to provide information regarding the length, location, and laws governing the inspection. Moreover, the Pilot Program’s audit plan fails to identify how often the same trucking company or truck must undergo audits to obtain U.S. operating authority.

Mexico appreciates the futility in forcing the U.S. to conduct audits at the U.S. – Mexican border. Mexican labor has a stronger interest in the Pilot Program’s success than U.S. labor which prefers the continued moratorium. Mexico comprehends that if it does not permit U.S. inspections within Mexico, the U.S. will likely reinstate the moratorium.

Mexico also realizes the ineffectiveness of NAFTA arbitration, as the Panel earlier provided the U.S. with broad discretion in interpreting and implementing NAFTA’s cross-border goods and services recommendations. Additionally, Mexico subtly condoned U.S. conduct under the moratorium by refusing to seek NAFTA – provided sanctions against the U.S., perhaps demonstrating Mexican trust that the U.S. would eventually lift the moratorium.\(^\text{104}\) Accordingly, Mexico has little negotiating power, and its only choice remains to accept U.S. audits within Mexico to facilitate the U.S. complying with NAFTA Annex I.

C. The Pilot Program’s Protocol Discounts U.S. National Safety And Federal Law

While the Pilot Program mandates strict inspection of Mexican trucks and drivers, the Program fails to integrate sufficient inspection standards to comply with the Patriot Act and

Atomic Energy Act. Additionally, the Program’s satellite tracking system ineffectively monitors interstate deliveries within the U.S. Lastly, the Program raises safety concerns within Mexico as the Program provides no inspection procedures regarding U.S. exports to Mexico.

The Pilot Program incorporates numerous procedural rules designed to protect both Mexican truck drivers and U.S. residents. The Program requires that any Mexico-domiciled carrier authorized to operate within the U.S. beyond the commercial zone bear a Commercial Vehicle Safety Alliance (“CVSA”) inspection decal.\textsuperscript{105} The CVSA decal certifies that U.S. agents have inspected and endorsed a particular Mexican truck to obtain U.S. operating authority.\textsuperscript{106} The CVSA decal is valid for three months, and may exempt a Mexican truck from further inspection within that three month corridor.\textsuperscript{107} Additionally, the Program requires each truck to conform to certain size and weight limits\textsuperscript{108} and the National Highway Traffic Safety Administration’s (“NHTSA”) Federal Motor Vehicle Safety Standards (“FMVSS”).\textsuperscript{109}

Furthermore, the Program imposes varying requirements on the Mexican truck drivers. The Program obligates Mexican truck drivers to maintain a valid Mexican driver’s license and present proof of insurance by a U.S. certified insurance carrier upon entering the United States.\textsuperscript{110} Mexican truck drivers must further comply with U.S. hours of service requirements.\textsuperscript{111}

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\item[106] 49 C.F.R. § 365.511 (2002).
\item[107] Id.
\item[108] FMCSA Notice, supra note 105.
\item[109] FMCSA Notice, supra note 105.
\item[111] Demonstration Project, supra note 110.
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driver medical standards, and alcohol and narcotic testing. Under the Program, drivers must also pass a test demonstrating their English communication ability.

Lastly, the Program limits the Mexican truck drivers’ actual deliveries. Under the Program, the U.S. forbids Mexican drivers from transporting hazardous materials into the United States. The U.S. also dictates that a Mexican truck driver may only deliver goods from Mexico to a final U.S. destination; therefore, the Program precludes Mexican truck drivers from making deliveries commencing in one State and terminating in another.

In October 2001, President Bush signed the U.S.A. Patriot Act, which aimed at expanding U.S. law enforcement’s authority to combat both domestic and international terrorism. Congress later reauthorized the Patriot Act in 2006. The Patriot Act, Title IV, Subtitle B, section 411 prohibits aliens from entering the United States who participate in or represent a foreign organization that condones terrorism. Notably, the Patriot Act also bans that alien’s family members from entering the United States.

The NAFTA Pilot Program altogether disregards the Patriot Act, Title IV, Subtitle B by not implementing a system to determine whether Mexican truck drivers comply with Subtitle B. Under the current Pilot Program structure, there is no established communication system between the U.S. State and Federal Inspectors and the Department of Homeland Security.

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112 Demonstration Project, supra note 110.
113 Demonstration Project, supra note 110.
114 Demonstration Project, supra note 110.
116 Sec’y of Transp., supra note 5.
119 U.S.A. Patriot Act, supra note 124, at tit. iv, subtit. b, sec. 411.
120 Id.
(“DHS”) regarding prescreening the Mexican drivers for Patriot Act compliance. When Mexican truck drivers approach the U.S. border, inspectors are unaware whether that driver is an alien or family member of an alien who supports a foreign organization that condones terrorism. Moreover, a Mexican truck driver seeking U.S. operating authority may furtively participate in or tacitly condone a foreign terrorist organization, thus evading potential discovery.

Although the DOT emphasized that all Mexican truckers entering the United States must meet immigration entry requirements,\(^{121}\) a visa does not automatically bring the Program within Patriot Act compliance. Under the Pilot Program, the DOT will grant Mexican truck drivers special one-year visas to present upon entry to the United States.\(^{122}\) While a truck driver’s initial visa connotes U.S. compliance with the Patriot Act, the U.S. essentially exempts that driver from Patriot Act compliance for the next year, unless suspicions arise. The United States has not implemented a system to monitor the truck drivers or their families for Patriot Act compliance after the U.S. grants the drivers their initial visas. Therefore, while a visa initially signifies Patriot Act compliance, the visa does not mechanically suggest compliance with the Patriot Act throughout the visa’s one year duration.

To bring the Pilot Program within Patriot Act compliance would impose an absolute and costly burden on U.S. intelligence agencies. This compliance task would obligate the DHS and other domestic intelligence agencies to gather information on Mexican drivers and their families prior to entering the United States. This undertaking alone would cripple resources already aimed at investigating suspected terrorists abroad.

Further, the U.S. should impose higher standards than those on normal tourists, because unlike tourists, Mexican truck drivers transport large quantities of goods through several states.

\(^{121}\) DOT Cross Border Truck Safety Inspection Program, \textit{supra} note 115.

\(^{122}\) Sec’y of Transp, \textit{supra} note 5.
with the ability to serious injure persons or affect local economies. Moreover, the truck drivers’ actions either enhance or impede the ultimate success of the Pilot Program, the U.S.’ commitment to honoring NAFTA, and international relations between the U.S., Mexico, and Canada. Contrarily, only in rare instances will a single tourist’s actions within the U.S. largely affect an international trade agreement or international relations.

Accordingly, the U.S. should request compliance from Mexican intelligence agencies to provide continuous information regarding the Mexican truck driver’s direct or attenuated connection to any foreign terrorist organizations. The U.S. should further revise the Pilot Program to mandate Mexican trucking companies to provide the U.S. and Mexican intelligence agencies with the Mexican truck driver’s name months before his actual arrival at any U.S. border crossing. This revision would afford both countries’ intelligence agencies ample time to cull the Mexican truck driver’s possible terrorist links, thereby demonstrating a good faith effort to bring the Pilot Program within Patriot Act requirements. If the driver already possesses a valid visa, the U.S. and Mexico must focus intelligence resources on continually ensuring that the driver and his family do not contravene the Patriot Act, Title IV, Subtitle B.

The Pilot Program additionally undercuts stringent U.S. policies aimed at protecting U.S. residents from nuclear exposure or terrorism. The Atomic Energy Act of 1946 makes it unlawful for any person to “export from or import into the United States any fissionable material, or directly or indirectly be a party to or in any way a beneficiary of, any contract, arrangement or other activity pertaining to the production, refining, or processing of any fissionable material
outside of the United States.\textsuperscript{123} A person, however, may seek Nuclear Regulatory Commission approval to import or export fissionable material for research purposes.\textsuperscript{124}

Presently, the Pilot Program provides no inspection procedure regarding importing or exporting fissionable material between the United States and Mexico. Under the Pilot Program’s Thirty-Seven Point Level Safety Inspection Checklist, step six requires the U.S. inspector to check for the presence of hazardous materials and dangerous goods.\textsuperscript{125} Step six requires inspectors to check shipping papers, placards, unsecured cargo, markings, labels, leaks and spills.\textsuperscript{126}

While inspection remains an issue with all imports, the U.S. must subject Mexico to enhanced scrutiny under the Pilot Program. First, the Pilot Program offers a new access point to America that currently reflects inadequate and developing inspection procedures. Dissimilar to American ports, Program inspectors can realistically inspect all cargo entering the United States. As the U.S. often cites safety concerns regarding lack of inspection at U.S. ports,\textsuperscript{127} allowing U.S. inspectors to inspect all Program cargo would quell a foreseeable U.S. concern before it starts. Second, the U.S. should employ the strictest protocol in the Pilot Program to test its effectiveness after the Pilot Program ends. Thus, the U.S. may evaluate the protocol’s effectiveness when implementing a permanent NAFTA cross-border trucking program. By failing to employ strict inspection standards in the test phase- the Pilot Program, the U.S. cannot effectively gauge the required standards for the permanent program. If the U.S. deems that the

\textsuperscript{124} Id.
\textsuperscript{126} Id.
Program inspection procedures were too stringent or burdensome, they may incorporate these changes in any permanent program the U.S. pursues.

The Program’s current inspection procedure fails to satisfy the strict standards enumerated in the Atomic Energy Act of 1946, thus threatening U.S. safety. The DOT has emphasized that upon entering the U.S., inspectors will screen each Mexican truck, “which could include radiation portal monitoring and x-ray inspections of high risk cargo.” But, if a border crossing does not contain a radiation portal, or if inspectors subjectively decide not to scan the truck for radiation, the inspectors must rely solely on the shipping papers, placards, markings, and the truck driver’s declaration to determine whether that driver currently transports nuclear material. Moreover, individuals may conceal minute amounts of fissionable material within the truck’s frame, thus avoiding the inspector’s scrutiny. Since the actual truck frame may be exempt from inspection for three-months after receiving a CVSA decal, inspectors will indubitably fail to detect nuclear material hidden within the frame in this three-month corridor.

To comply with the Atomic Energy Act of 1946, the U.S. should make several changes to the Pilot Program. First, the U.S. should invest in radiation detection portals for each of the twenty-five cross-border checkpoints. These radiation detection portals provide real time detection and identification of radioactive material within moving vehicles, including commercial trucks. Second, the U.S. should mandate inspectors and the Nuclear Regulatory Commission to maintain an open database regarding potential importers and exporters of

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fissionable material. Third, the DOT must subject each truck to radiation inspection each time, rather than casually insisting that inspection “could include radiation portal monitoring.”

Due to its non-compliance with the Patriot Act and Atomic Energy Act of 1946, the Pilot Program threatens U.S. national safety by not effectively tracking trucks after they enter the U.S. In November 2007, the FMCSA announced a satellite tracking program to track Pilot Program trucks within the United States. Under the satellite tracking program, the FMCSA will equip each truck with a Global Positioning System (“GPS”) device to monitor the trucks location and hours-of-service compliance. But, this tracking system remains futile in enforcing the Pilot Programs restriction that Mexican truck drivers may not make deliveries from one U.S. state to another (“interstate deliveries). When crossing interstate borders, Mexican truck drivers may effortlessly proceed with forbidden interstate deliveries so long as those deliveries weigh and appear the same as the initial goods the truck carried upon entering the U.S. The absence of weigh stations and interstate inspection facilities further exacerbates this issue.

The DOT could resolve this problem by requiring inspection of the carrier’s goods at each state border crossing and establishing specific weigh stations for Pilot Program drivers. The U.S. could also limit the Mexican truck driver’s operating time and route within the U.S., thus theoretically restricting the driver to pursue a set course to his end location. Idealistically, the U.S. should design a system requiring U.S. recipients of goods under the Program to confirm the goods’ delivery time and driver.

While the Pilot Program invokes many national safety concerns regarding what enters the U.S., the Program provides a deficient apparatus to monitor what leaves the U.S. Until Mexico

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130 DOT, supra note 125.
132 See id.
establishes a comprehensive system monitoring U.S. exports, the Pilot Program raises threatening safety concerns for Mexico. The DOT’s safety protocol only applies to Mexican trucks entering the U.S., and not to those leaving. Therefore, Mexican safety is at risk as Pilot Program trucks returning to Mexico may perchance contain illicit substances, people, or even weapons.

V. CONCLUSION: PROPOSALS FOR A MODIFIED DEMONSTRATION PROJECT

The NAFTA Pilot Program is in jeopardy. Concerned with the threat to U.S. safety, Congress has withheld funding for the Program. Nevertheless, the President and the DOT have continued to implement the Program under a peculiar loophole in the Pilot Program’s implementing law.

Mexico and the U.S. must amend NAFTA’s arbitration process to provide for binding decisions and an effective sanction enforcement mechanism. The countries must amend NAFTA to mandate the U.S. and Mexico to recognize the legitimacy and authority of NAFTA arbitral panel decisions. Such legislation should oblige, rather than permit, Mexico and the U.S. to suspend trading benefits or impose sanctions when an arbitral panel has found a NAFTA violation. As countries are unable to swiftly resolve their conflicts, evidenced by the friction between Mexico and the U.S. over the decade long moratorium against Mexican trucks after the NAFTA scheduled phase-out, imposing mandatory sanctions could encourage a country, such as the U.S., to more promptly honor its NAFTA commitments. Additionally, NAFTA arbitral panels must issue “requirements” and not “recommendations” to the breaching country. While provisionally frustrating NAFTA’s objectives, the countries could easily collect sanctions by levying temporary taxes and imposing quota restrictions on the breaching country’s goods and
services. To meet this goal, the countries should experimentally fund an arbitral panel enforcement agency.

Modernly, U.S. parties interested in banning the Pilot Program routinely cite the Program’s threat to U.S. personal and job security. While a terrorist threat to the U.S. originating from Mexico remains improbable, the Pilot Program’s insufficient inspection procedure undoubtedly broadcasts a gateway into the U.S. for opportunistic terrorists and traffickers. Nevertheless, U.S. labor concerns ebb as the U.S. places strict limits on how many Mexican trucking firms may obtain U.S. operating authority, and Mexico permitting U.S. trucking firms to expand operation in Mexico under the Pilot Program.

The U.S., however, should pursue a path to protect both American and Mexican citizens while concomitantly honoring NAFTA. In so doing, the U.S. will demonstrate its commitment toward liberalizing trade and honoring international agreements, thereby generating international integrity and spurring more free trade negotiations. But with the potential threat of terrorism, trafficking, and illegal immigration, the U.S. should resolve the issues regarding the Pilot Program’s substandard inspection protocol, preemption of federal law, and violation of Mexican sovereignty. After implementing the abovementioned proposals, the U.S. should then instate the modified Pilot Program, evaluate its effectiveness after one year, and thereby demonstrate a good faith effort to comply with NAFTA’s requirements.